judge should by reason of the "without prejudice" letter of August 14, 1976 have excluded from the hearing of the petition the first appellant's letter of August 12, 1976 admitting the debt, and (b) if the learned trial judge had done so then there would have been introduced into the hearing the question of a bona fide dispute as to the debt, whereupon the petition should not have been proceeded with until such time as the dispute had been resolved. In support of this contention we were referred by him to section 23 of the Evidence Act and to the case of *Peacock* v. *Harper*.[1] In answer counsel for the respondent referred us to the case of *Re Welsh Brick Industries Ltd.*[2] which decided that the mere fact that unconditional leave to defend an action relating to a debt has been given, is not sufficient to make a winding-up petition one based upon a "disputed debt" and that it was for the judge exercising the jurisdiction in winding up to consider all the facts before him to decide whether or not there was a *bona fide* dispute as to the petitioner's debt, the grant of leave to defend being merely one matter to be taken into consideration.

Section 23 of the Evidence Act reads as follows:—

"In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given."

Having regard to the clear and unequivocal admission of the petitioner's debt contained in the first letter the learned judge was entitled to come to the conclusion that there was no *bona fide* dispute.

With regard to the first appellant's contention that the learned judge was wrong in finding that the company was unable to pay its debts, it is to be observed that the petition is based on the company's failure to pay or give security for the debt of which a statutory demand has been made. The law is clear and is as stated in *Buckley* on the Companies Acts, 13th Edition, at page 460 as follows: —

"The particular indications of insolvency mentioned in paragraphs (a), (b) and (c) are all instances of commercial insolvency, that is of the company being unable to meet current demands upon it. In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up."

Accordingly, in our judgment the appeal must fail and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Francis T. Seow; Lee & Lee.*

WOH HUP (PTE.) LTD. v. CHINA INSURANCE CO. LTD.

[C.A. (Wee Chong Jin C.J., Choor Singh & D'Cotta JJ.) October 8, 1977]
[Singapore — Civil Appeal No. 23 of 1937]

Tort — Occupier's liability — Workman electrocuted by live electrical cable on ground — No proper warning sign — Compensation paid by insurers of employers of deceased workman — Whether insurers entitled to be indemnified by occupiers by right of subrogation — Workmen's Compensation Act (Cap. 130), s. 20(b).

Insurance — Workman's compensation paid by insurers of employers of deceased workman — Whether insurers entitled to be indemnified by occupiers by right of subrogation — Workmen's Compensation Act (Cap. 130), s. 20(b).

This was an appeal from the decision of the High Court ([1977] 2 M.L.J. 57). The respondents had claimed to be reimbursed by the appellants the sum of compensation which they had paid on behalf of their insured in respect of the death of their workman under the Workmen's Compensation Act. The High Court held that the appellants were the occupiers of the worksite where the accident occurred, that they were in occupational control of the worksite and were under a duty of care to the deceased. It was further held that there was no danger or warning signs at the worksite and the appellants had failed in their duty of care. The respondents were therefore held entitled to recover the sum which they had paid as insurers of the employers as workman's compensation in respect of the death of the deceased. The appellants appealed.

Held, dismissing the appeal: (1) the respondents were the persons by whom the compensation was paid within the meaning of section 20(b) of the Workmen's Compensation Act and were therefore entitled to be indemnified and this statutory right to be indemnified included the right to sue in their own name;

(2) the appellants knew or should have known that by allowing cables carrying electricity to lie on the ground across the path used by workmen they were creating a concealed danger to all workmen using that path and should have taken appropriate measures to warn them of such danger. As they had failed to do so the appellants were clearly in breach of their duty to the deceased who as a licensee was entitled to be warned of such concealed danger;

(3) On the facts there was no contributory negligence on the part of the deceased;

(4) there was evidence in this case to show that the sum of compensation was paid under section 8(2) of the Workmen's Compensation Act on a claim made by the Commissioner of Labour on behalf of the widow. This was sufficient evidence to shift the burden to the appellants and it was open to the appellants to show by evidence at the trial that in a common law action, the widow of the deceased could not have recovered the sum awarded as damages in a dependency action. This they failed to do and therefore the learned judge was right in allowing the claim of the respondents for reimbursement.

Case referred to:-

(1) *County Council of Galway* v. *The County of Galway Board of Health and Public Assistance* [1931] I.R. 547.

COURT OF APPEAL.

Cheong Yuen Hee for the appellants.

Peter Lee for the respondents.

Choor Singh J. (delivering the judgment of the Court): This appeal arises from a claim in the High Court by the abovenamed respondents to be reimbursed by the appellants the sum of $11,160 which they had paid on behalf of their insured, Cheng Meng Furniture Co. (Pte) Ltd. in respect of the death of their workman, one Sitaram son of Shonlal under the Workmen's Compensation Act (Cap. 130). By judgment dated April 26, 1977, the High Court ordered the appellants to pay the respondents the sum claimed.

The appellants now appeal against the said judgment.

The facts are these. The respondents are an insurance company. The appellants are contractors and were at the material time the main contractors for the construction of a large shopping-cum-residence complex in Beach Road known as the Woh Hup Complex. The accident which gave rise to this claim occurred when the said complex was still under construction and a number of other contractors were carrying out various works at the site. On February 19, 1973 the deceased Sitaram s/o Shonlal, a labourer employed by the said Cheng Meng Furniture Co. (Pte) Ltd. which had a contract to do some work in one of the penthouses on the top floor of the complex was pushing a wheel barrow laden with some bags of cement along a path in the open yard at the work site of the said Woh Hup Complex when the said wheel barrow in going over some electric cables lying on the ground in its path cut the insulation of one of the cables whereupon the said Sitaram s/o Shonlal was electrocuted.

The respondents as insurers of Cheng Meng paid out a sum of $11,160 in respect of the death of the deceased on a claim under the Workmen's Compensation Act and sought to recover this sum from the appellants on the ground that they were entitled to be indemnified by the appellants by right of subrogation under the Workmen's Compensation Act.

The trial judge found on the evidence that the appellants as the main contractors were the occupiers of the work site where the accident occurred; that the appellants knew that the deceased's employers Cheng Meng were doing some work for the owners of a penthouse on the top floor of the complex; that Cheng Meng's workmen were carrying materials across the open yard to the lift in the complex; that at the time of the accident there were electric cables lying on the ground across the path which the deceased was using to take bags of cement on a wheel barrow to the lift; that the deceased was therefore not a trespasser but a licensee; that the appellants were under a duty of care to the deceased; that the duty owed by the appellants to the deceased was to warn him of concealed dangers actually known to them but neither known or obvious to the deceased; that the electric cables lying across the path used by the deceased were live cables which carried electricity from the switchboard in the complex to another part of the work site; that the electricity which passed through the cables constituted a concealed danger; that the appellants were under a duty to protect workmen using the path from the concealed danger by erecting a barrier or giving a warning or otherwise that there were live cables running across the path; that at the time of the accident there was no danger sign placed near the cables to warn users of the path and that the appellants had therefore failed in their duty of care to the deceased. Accordingly the trial judge gave judgment for the respondents.

The point was taken, both before the trial judge and before us, that the respondents were not entitled to sue the appellants in their own name. It was contended that since the respondents claimed by right of subrogation, the proper plaintiffs were Cheng Meng. The trial judge held that the short answer to this submission was that section 20(b) of the Workmen's Compensation Act (Cap. 130) which was in force at the material time enabled the respondents to sue in their own name. The said section 20(b) provided as follows: —

> "20. Where any injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employers to pay damages in respect thereof —
>
> (a) xxx xxx
>
> (b) if the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called upon to pay an indemnity under subsection (2) of section 19 of this Act, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid and all questions as to the right to and amount of any such indemnity may, in default of agreement, be settled by an arbitrator."

On the facts of this case, the respondents were "the person by whom the compensation was paid", and they were therefore entitled to be indemnified, under section 20(b) of the Workmen's Compensation Act (Cap. 130). We agree with the trial judge that the respondents' statutory right to be indemnified included the right to sue in their own name.

The next point taken before us was that the trial judge "erred in finding that the appellants owed a duty of care to the deceased to warn him of the alleged concealed danger of the electric cable and that the appellants failed in that duty". In our opinion the facts which speak for themselves are overwhelmingly against the appellants. They know or should have known that by allowing cables carrying electricity to lie on the ground across the path used by workmen, they were creating a concealed danger to all workmen using that path and should have taken appropriate measures to warn them of such danger. As they failed to do so, the appellants were clearly in breach of their duty to the deceased who as a licensee was entitled to be warned of such a concealed danger.

Another point taken before us is that "the learned judge erred in law and in fact in finding that the deceased was not in anyway to be blamed for the accident". In our opinion the facts on this issue are again entirely against the appellants. Photographs taken at the scene of the accident immediately after the accident and tendered at the trial show quite clearly that at the site of the accident, on both sides of the path used by the deceased there were a lot of discarded materials, junk and rubbish lying around which concealed the cables lying on the ground, and it would be unreasonable to expect anyone using the path to realise that the exposed portion of cables across the path were live cables carrying electricity and not bits of discarded cables. The deceased was pushing a heavily laden wheel barrow with the assistance of two other workmen and thus concentrating on the task assigned to him and in the absence of any danger sign or warning had no reason to assume that it was dangerous for him to push the wheel barrow over the cables. In our judgment there was no contributory negligence on the part of the deceased.

The last submission before us by counsel for the appellants is based on the provisions of section 20(b) of the Workmen's Compensation Act (Cap. 130) which we have already set out. The submission is

that the trial judge "erred in law in failing entirely to consider the omission of the respondents to adduce any evidence whatsoever that the payment by them on behalf of their insured was justified under the provisions of the Workmen's Compensation Act." The decision in *County Council of Galway* v. *The County of Galway Board of Health and Public Assistance*[1] is cited in support of this submission. In this Irish case, Meredith J. had to construe subsection 2 of section 6 of the Workmen's Compensation Act, 1906 which is substantially in terms with section 20(b) of our Workmen's Compensation Act (Cap. 130). Meredith J. held that the right to be indemnified conferred by the subsection was subject to the concluding words, "and all questions as to the right to and amount of any such indemnity may, in default of agreement, be settled by action or by consent of the parties, by arbitration"; that these words qualify the employer's title to be indemnified; that the first part of the subsection was merely intended to give the employer a right over against the stranger in respect of his original liability to the workmen; and that questions as to the right to, and the amount of, the indemnity are left open and at large for settlement, if necessary by action. Meredith J. went on to add that the right conferred by the subsection "was limited to the amount which the workman might have recovered as damages had he brought his action against the defendants".

Although counsel for the appellants has not put it so clearly, his submission really is that as the respondents in this case did not tender any evidence at the trial to show that in a claim at common law, made on behalf of the deceased, a sum of $11,160 could have been recovered as damages, the trial judge should have dismissed the respondents' claim for want of evidence. It is true that in his judgment the trial judge has not dealt with this aspect of the case although submissions on this issue were made by both counsel. There is however evidence on record which shows that the claim before the Commissioner for Workmen's Compensation was a dependency claim made on behalf of the widow of the deceased; that the average monthly earnings of the deceased at the time of his death were $155 per mensem; that the Commissioner for Labour made a claim on behalf of the widow under section 8(2) of the Workmen's Compensation Act for a lump sum payment of 72 months wages amounting to $11,160 and that this claim was accepted by the deceased's employers and by the respondents as their insurers. In our opinion this was sufficient evidence to shift the burden of proof on the appellants. It was open to the appellants to show by evidence at the trial that in a common law action, the widow of the deceased, could not have recovered as much as $11,160 as damages in a dependency claim. This they failed to do and therefore have only themselves to blame.

In our judgment the trial judge came to a right decision in allowing the claim of the respondents and entering judgment for $11,160 against the appellants. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Chan, Goh & Co.; S.K. Lee & Co.*

MALAYSIAN REPORTS

KEK KEE LENG v. TERESA BONG NGUK CHIN & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat F.J. and Seah J.) August 20, 1977]

[Kuching — Federal Court Civil Appeal No. 111 of 1976]

Tort — Accident — Negligence — Contributory negligence — Vicarious liability — Whether driver agent of owner of vehicle — Damages.

Damages — Leg — Lower limb.

This was an appeal against the decision in the High Court where it had been held that both the appellant, the rider of the motor scooter and the second respondent, the driver of the motor car were blameworthy for the accident which had occurred in the proportion of one third to the appellant and two-thirds to the respondent. The learned judge also dismissed the action against the first respondent, the owner of the motor car, who was the wife of the driver, the second respondent, on the ground that the second respondent was not driving as her agent at the material time. The appellant appealed to the Federal Court.

Held: (1) on the facts as well as the findings of the court, the learned judge should have held that the accident was caused solely by the negligence of the second respondent and that the appellant was in no way to be blamed for the collision. Having regard to the specific findings of the learned judge, the appellant could not reasonably have avoided the consequences of the second respondent's negligence in turning from a side road into a main road without stopping at the junction;

(2) it was not correct for the learned judge to decide on the question of agency without hearing the owner of the motor car unless her absence could be accounted for. In the absence of evidence the learned judge should have ruled that the presumption that the driver of the car was driving as the servant or agent of the owner applied;

(3) the sum of $3,705 which had been advanced by the employers of the appellant should form part of the special damages for loss of earnings and the sum when received from the respondents should be returned to the employers;

(4) the sum of $5,000 awarded for general damages was within the figure commonly awarded to similar injuries of the lower limb of the leg and should not be disturbed.

Cases referred to:-

(1) *Cass* v. *Edinburgh Tramways* [1909] A.C. 1068.
(2) *Glasgow Corporation* v. *Taylor* [1922] 1 A.C. 44.
(3) *Kerry* v. *Carter* [1969] 1 W.L.R. 1372, 1376; [1969] 3 All E.R. 723 at p. 726.
(4) *Sepang Omnibus Sdn. Bhd.* v. *Christina Loh Soo Pang & Ors.* [1970] 2 M.L.J. 234.
(5) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49
(6) *Caswell* v. *Powell Duffryn Associated Collieries* [1940] A.C. 152, 186.
(7) *R.* v. *Southern Canada Power Ry.* [1937] 3 All E.R. 923, 930.
(8) *Nanee* v. *British Columbia Electric Co.* [1951] A.C. 601, 611.
(9) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188, 194-195.
(10) *Rambarran* v. *Gurrucharan* [1970] 1 W.L.R. 556; [1970] 1 All E.R. 749.
(11) *Launchbury* v. *Morgans* [1972] 2 W.L.R. 1217; [1972] 2 All E.R. 606.
(12) *Dennis* v. *London Passenger Transport Board* [1948] 1 All E.R. 779.
(13) *Flint* v. *Lovell* [1935] 1 K.B. 354.
(14) *Davies* v. *Powell Duffryn Associated Collieries* [1942] A.C. 601, 616-617.